(1) Supreme Court, U.S.
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In the
Supreme Court of the United States

CHARLES PETER ALLISON, ET AL.,
Petitioners,

v.

DONALD N. SNYDER, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Seventh Circuit erred in holding that persons civilly committed under the Illinois Sexually Dangerous Persons Act for the explicit purpose of receiving mental health treatment may be subjected to the same conditions of confinement as convicted prisoners on the grounds that there is no meaningful distinction between such civilly committed persons and ordinary pretrial detainees.

II. Whether, after a person has been civilly committed for the explicit purpose of receiving mental health treatment, that treatment may be conditioned on the person's agreeing to (a) waive their right to confidentiality, (b) waive their privilege against self-incrimination, and (c) submit to polygraph examinations.

III. Whether persons civilly committed for the explicit purpose of receiving mental health treatment may be confined to an institution that is not designed to provide them with psychiatric care and treatment, and which does not, in fact, provide them access to mental health services that are reasonably calculated to promote their recovery.

PARTIES TO THE PROCEEDINGS BELOW

The parties before this Court are:

Plaintiffs-Petitioners Charles Peter Allison, Jeff Boyer, Robert Burns, Clayton Allen Coop, William C. Darnell, Steve Dinwiddie, Barrett J. Dixon, David L. Fales, John N. Guthrie, Thomas Hacker, Byron E. Hale, Mark C. Harris, Steven Wayne James, Richard A. Kalinowski, Richard Kastman, George A. Needs, David Peterson, Jeffrey Charles Smock, Charles Tannehill, Timothy M. Trainor, Brian A. Vercolio, Jason A. Welch, David R. Williams, Jeffrey T. Wilson, and Wayne Zielinski, and

Defendants-Respondents Donald N. Snyder, Jr., Mark S. Carich and Michael L. Holmes.

James F. Bommersbach, David Handel, and Bruce E. Wilcoxen were Plaintiffs and Appellees in the court below but have elected not to be parties to the instant petition.

RULE 29.6 STATEMENT

Rule 29.6 is inapplicable, as none of the petitioners are non-governmental corporations.

TABLE OF CONTENTS

Question Presented i

Parties to the Proceedings Below and Rule 29.6 Statement ii

Table of Contents iv

Table of Authorities Cited vi

Introductory Statement 1

Opinions Below 1

Jurisdiction 1

Statutes and Constitutional Provisions Involved 1

Statement of the Case 3

Reasons for Granting the Writ 5

I. The Seventh Circuit's opinion in this case ignores this Court's well-established Constitutional parameters for the confinement and treatment of civilly committed persons such as petitioners. 5

II. The Seventh Circuit erred in applying *McKune v. Lile* to civilly committed persons 8

III. The Seventh Circuit's opinion has caused a split in the circuits because it conflicts with the Ninth Circuit's prior opinion that a person civilly committed for mental health treatment is constitutionally entitled to individualized treatment. 10

Conclusion 11

Appendix

Appendix A
Seventh Circuit Opinion - 6/19/03 . . . . . 1a

Appendix B
District Court Order - 2/25/03 . . . . . 10a

TABLE OF AUTHORITIES CITED

Cases:

Bell v. Wolfish,
441 U.S. 520, 99 S.Ct. 1861 (1999) 5-7

Allen v. Illinois,
478 U.S. 364 (1986) 5, 6

McKune v. Lile,
536 U.S. 24 (2002) 8

Seling v. Young,
531 U.S. 250 (2001) 5, 9

Ohlinger v. Watson,
652 F.2d 775 (9th Cir. 1980) 10

Youngberg v. Romero,
457 U.S. 307 (1982) 3, 5, 6

Statutes:

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 . . . . . 2, 3

725 ILCS 205/1.01 . . . . . 2, 3

725 ILCS 205/1.01-1.12 6

725 ILCS 205/8 . . . . . 2, 8

Constitutional Provisions:

United States Constitution, Amend. V 1

United States Constitution, Amend. VIII 3

United States Constitution, Amend. XIV 1, 3

INTRODUCTORY STATEMENT

Charles Peter Allison and the other petitioners hereby petition this court for a writ of certiorari to review a judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit is reported at 332 F.3d 1076 (7th Cir. 2003). The Order of the United States District Court for the Southern District of Illinois denying respondent's Motion for Summary Judgment is unreported. It is appended hereto at pp. 10a-31a.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on June 19, 2003. The jurisdiction of this court is invoked under the provisions of 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., Amend. V.

. . . No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law. . . . .

U.S. Const., Amend. XIV.

. . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens

of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

725 ILCS 205/1.01

All persons suffering from a mental disorder, which mental disorder has existed for a period of not less than one year, immediately prior to the filing of the petition hereinafter provided for, coupled with criminal propensities to the commission of sex offenses, and who have demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children, are hereby declared sexually dangerous persons.

725 ILCS 205/8

If the respondent is found to be a sexually dangerous person then the court shall appoint the Director of Corrections guardian of the person found to be sexually dangerous and such person shall stand

committed to the custody of said guardian. The Director of Corrections shall keep safely the person so committed until the person has recovered and is released as hereinafter provided. The Director of Corrections as guardian shall provide care and treatment for the person committed to him designed to effect recovery. The Director may place that ward in any facility in the Department of Corrections or portion thereof set aside for the care and treatment of sexually dangerous persons.

STATEMENT OF THE CASE

This case began in 1997 with a *pro se* complaint filed pursuant to 42 U.S.C. § 1983, in the United States District Court for the Southern District of Illinois. The basis for jurisdiction in the District Court was 28 U.S.C. § 1331. That complaint was stricken (Doc. 14), refiled (Doc. 17), amended, (Doc. 45), amended a second time (Doc. 117), and supplemented through more definite statements of certain claims pursuant to Federal Rule of Civil Procedure 12(e) (Docs. 118, 120-21, 125, 136-38). Thereafter, the District Court dismissed plaintiffs' Eighth Amendment claims. (Docs. 170, 202).

Plaintiffs' surviving claims, seeking injunctive and monetary relief, were based on the Fourteenth Amendment and *Youngberg v. Romeo*, 457 U.S. 307 (1982), and alleged that plaintiffs, civilly committed under the Illinois Sexually Dangerous Persons Act, 725 ILCS 205/1.01 *et seq*, were denied due process of law under the Fourteenth Amendment because they were being confined under conditions that were punitive and were not designed to effect their recovery. Specifically, plaintiffs alleged that (1) they were confined in a prison, were in regular contact with ordinary prisoners, and

were subjected to the same rules and regulations as ordinary prisoners; (2) they were required, as a condition of treatment, to sign confidentiality waivers, agree to disclose past sex offenses and submit to polygraph examinations, and (3) the only therapy made available to them did not afford them with a realistic opportunity to correct the mental disease or defect for which they were committed because it was administered by individuals who were not qualified professionals and consisted solely of group therapy with no individual treatment provided. (Docs. 117, 137).

On January 13, 2003, the defendants (Illinois Department of Corrections officials responsible for plaintiffs' confinement) moved for summary judgment, arguing, among other things, that they were entitled to qualified immunity on some of plaintiffs' claims. (Docs. 190, 197). On February 25, 2003, the District Court denied defendants' motion to the extent that it sought summary judgment on the grounds of qualified immunity. (Doc. 205) (App. p. 10a). On February, 28, 2003, the defendants filed a notice of appeal (Doc. 211).

On June 19, 2003, the United States Court of Appeals for the Seventh Circuit issued its decision, in which it concluded that defendants "prevail on the merits, without any need for qualified immunity." *Allison v. Snyder*, 332 F.3d 1076 (7th Cir. 2003) (App. p. 9a).

REASONS FOR GRANTING THE WRIT

I. The Seventh Circuit's opinion in this case ignores this Court's well-established Constitutional parameters for the confinement and treatment of civilly committed persons such as petitioners.

In holding that civilly committed sexually dangerous persons may constitutionally be confined under conditions identical to those to which convicted criminals are subjected, the Seventh Circuit set forth the novel proposition that civilly committed persons may be equated with pretrial detainees, and based its opinion on this Court's holding in *Bell v. Wolfish*, 441 U.S. 520 (1979) (App. 4a.). In doing so, the Seventh Circuit, while paying lip service to this Court's decisions in *Youngberg v. Romeo*, 457 U.S. 319 (1982); *Allen v. Illinois*, 478 U.S. 364 (1986), and *Seling v. Young*, 531 U.S. 250 (2001), ignored the essence of those decisions, even though they provide most of this Court's law governing the treatment of civilly committed persons.[1]

The Seventh Circuit's disregard of *Allen* provides especially strong grounds for accepting the instant petition. In *Allen,* this Court upheld the constitutionality of an earlier

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[1] The court below quoted this Court's admonition that "due process requires that the conditions and duration of confinement [for civilly committed persons] bear some reasonable relation to the purpose for which persons are committed," *Seling*, 531 U.S. at 265 (App. 3a). However, it evaded the clear implication of this language by discussing in the very next sentence "goals such as preventing escape," without ever acknowledging that the "purpose for which petitioners are committed" is to receive appropriate mental health treatment.

version of the law at issue here, the Illinois Sexually Dangerous Persons Act (725 ILCS 205/1.01-12. ("Act."). In holding that the act was civil, not criminal, this Court stated:

> Had petitioner shown, for example, that the confinement of such persons imposes on them a regimen which is essentially identical to that imposed on felons with no need for psychiatric care, this might well be a different case. . . . 478 U.S. at 373

In the present case, the Seventh Circuit acknowledged that plaintiffs are confined to a correctional center "where they mingle with convicts at meals and on some other occasions," *Allison v. Snyder*, 332 F.3d 1076, 1078 (7th Cir. 2003), and asked rhetorically, "Does placement in a prison, subject to the institution's usual rules of conduct, signify punishment?" *Allison*, 332 F.3d at 1079. Relying on *Wolfish*, the court answered its question "No." *Allison*, 332 F.3d at 1079. The question, however, implicitly acknowledged, and the court presumed, that the regimen imposed on plaintiffs was "essentially identical to that imposed on felons with no need for psychiatric care." *Allen*, 478 U.S. at 373.

The *Allen* Court observed that "counsel for the State assures us that under Illinois law sexually dangerous persons must not be treated like ordinary prisoners." *Allen*, 478 U.S. at 374. That however, is exactly how plaintiffs have been treated. This is therefore the "different case" about which the *Allen* Court warned. The court below did not recognize that reality and did not recognize that civil committees are entitled to "more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." *Youngberg v. Romeo*, 457 U.S. 319, 321-22 (1982).

In *Wolfish*, this Court held that pretrial detainees can be subjected to the same conditions of confinement as convicted prisoners. The Seventh Circuit opined that under the Illinois' Sexually Dangerous Persons Act, criminal charges against the plaintiffs remain pending while they are in the program. On this basis, the court below characterized plaintiffs as pretrial detainees and held that like the detainees in *Wolfish*, plaintiffs here could be "subjected to the ordinary conditions of confinement." *Allison*, 332 F.3d at 1079.

The pendency of charges, however, is the only similarity between ordinary pretrial detainees and plaintiffs. Ordinary pretrial detainees are presumed innocent. Plaintiffs have been **found** to be sexually dangerous. Ordinary pretrial detainees can usually make bail and gain their release. Plaintiffs cannot get out until they are judicially deemed to be cured.

The court below said that plaintiffs are "persons detained before trial as sexually dangerous persons," *Allison*, 332 F.3d at 1079. That statement implicitly suggests that plaintiffs can expect a trial. In fact, ordinary pretrial detainees **can** expect a trial. They can assert their constitutional right to a speedy trial and force a court to determine their guilt or innocence. If convicted, they will get credit against their sentences for time served as pretrial detainees. If acquitted, they will be released.

In contrast, plaintiffs cannot force a determination of their guilt or innocence and cannot expect a trial (speedy or otherwise). Instead, they can expect to remain in custody indefinitely. In the unlikely event they were tried and convicted, there is no provison in the Act that provides for them to receive credit against any sentence for time spent as civil committees.

II. The Seventh Circuit erred in applying *McKune v. Lile* to civilly committed persons

This case also provides an opportunity for the Court to explain its holding in *McKune v. Lile*, 536 U.S. 24 (2002), and review what appears to be the Seventh Circuit's precipitous expansion of the holding in that case. *McKune* involved requirements imposed on convicted Kansas sex offenders. Such persons were given the option of participating in a prerelease sexual abuse program. As part of the program each offender was required to complete and sign an acceptance of responsibility form, accepting responsibility for the crime for which the person was sentenced, and a sexual history form admitting all prior sexual activities. 536 U.S. at 30. A polygraph was used to verify the accuracy of these revelations. *Id.* Each offender was told that the information provided was not privileged, could be used in a criminal prosecution, and, if it involved a minor, would be reported to the authorities. *Id.*

The requirements imposed on the offenders in *Lile* are very similar to the requirements imposed on petitioners here. However, the parties are very differently situated. The offender in *Lile* was a convicted sex offender, confined in prison as punishment. *Id.* at 29. An offender who did not complete the requirements set forth in *Lile* was not allowed in the treatment program. *Id.* at 30. However, that person's period of confinement was not extended. *Id.* at 38. Therefore, said this Court, the consequences of non-participation were not "atypical and significant hardships in relation to the ordinary incidents of prison life." *Id.*

In sharp contrast, the plaintiffs here are civil committees who were committed not for punitive purposes, but so that they might receive treatment. 725 ILCS 205/8. Plaintiffs were

not offered a voluntary program incidental and supplemental to their incarceration; they were incarcerated **in order** that they might receive treatment. If plaintiffs fail to sign a waiver, agree to take a polygraph, and own up to past offenses, including those not charged and not known to the authorities, plaintiffs will not receive the very treatment for which they were committed and to which they are constitutionally entitled.

The court below says that plaintiffs who refuse these requirements are in a position no different than a person who refuses a plea bargain. *Allison*, 332 F.3d at 1080. However, a person who refuses a plea bargain can expect a trial. Plaintiffs who refuse the conditions at issue here can expect nothing but continued incarceration in a prison without treatment. Confinement with convicted felons, in a prison, without treatment is punishment. It can be nothing else. "Due process requires that the conditions and duration of confinement . . . bear some reasonable relation to the purposes for which person are committed." *Seling v. Young*, 531 U.S. 250, 265, 121 S. Ct. 727 (2001). Plaintiffs were committed for treatment; confinement without treatment bears no relationship, reasonable or otherwise, to the purposes for which plaintiffs were committed.

Treatment programs with self-accusatory features are common. This case provides this Court with an opportunity to determine what consequences may attach when a person committed for treatment declines the invitation to accuse himself (and to submit to procedures designed to verify those accusations).

III. The Seventh Circuit's opinion has caused a split in the circuits because it conflicts with the Ninth Circuit's prior opinion that a person civilly committed for mental health treatment is constitutionally entitled to individualized treatment.

The court below acknowledged that its view on the adequacy of plaintiffs' treatment is not universally held by courts in other circuits. Specifically, the court noted that *Ohlinger v. Watson*, 652 F.2d 775, 778-79 (9th Cir. 1980), held "that treatment [for civilly committed sex offenders] must be tailored to each individual rather than administered to groups." *Allison*, 332 F.3d at 1081. This statement, said the *Allison* court, was simply an "unreasoned judicial assertion" entitled to "slight value." *Id*. The Ninth Circuit view, whether "unreasoned" or not, is based on *Jackson v. Indiana*, 406 U.S. 715, 738 (1972), cited in *Ohlinger*, 652 F.2d at 778. It is clearly different than the Seventh Circuit's view. This case provides an excellent vehicle for reconciling these cases and clarifying the law.

CONCLUSION

For the reasons stated above, the petitioners, Charles Peter Allison et al, urge that this petition for a writ of certiorari be granted.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 03-1570

[May 28, 2003, Argued
June 19, 2003, Decided]

CHARLES PETER ALLISON, et al., Plaintiffs-Appellees,	)
v.	)
DONALD N. SNYDER, JR., MARK S. CARICH, and MICHAEL L. HOLMES, Defendants-Appellants.	)

Appeal from the United States District Court
for the Southern District of Illinois
No. 97-432-MJR
Michael J. Reagan, Judge

JUDGES: Before EASTERBROOK, MANION, and KANNE, Circuit Judges.

OPINION

EASTERBROOK, *Circuit Judge*. Persons charged with sex offenses in Illinois may be diverted before trial to civil confinement, if a mental illness of a least one year's duration led to the criminal conduct. Those who complete treatment successfully are released and the criminal charges dismissed. The Illinois Sexually Dangerous Persons Act, 725 ILCS 205/1.01 to 12, is described, and sustained against one constitutional challenge, in *Allen v. Illinois*, 478 U.S. 364, 92 L. Ed. 2d 296, 106 S. Ct. 2988 (1986). In this suit under 42 U.S.C. § 1983, twenty-seven persons committed under the Act contend that it is being implemented unconstitutionally in at least three ways: first, they are confined in one wing of an institution that also serves as a prison; second, their treatment includes self-accusatory features; third, it is conducted on a group rather than an individual basis. Plaintiffs seek both damages and injunctive relief. After discovery was completed, the district judge resolved some claims in favor of some defendants on summary judgment. But he rejected three defendants' argument that qualified immunity protects them from damages liability. These three have filed an interlocutory appeal. *See Behrens v. Pelletier*, 516 U.S. 299, 133 L. Ed. 2d 773, 116 S. Ct. 834 (1996); *Scott v. Lacy*, 811 F.2d 1153 (7th Cir. 1987). The initial step in evaluating any immunity defense is determining whether the complaint states a claim, *see Saucier v. Katz*, 533 U.S. 194, 201, 150 L. Ed. 2d 272, 121 S. Ct. 2151 (2001), so we discuss the merits along with the question whether the legal principles on which plaintiffs rely were so clearly established that persons in defendants' position had to understand that what they were doing violated the Constitution.

All of the plaintiffs are confined at Big Muddy River Correctional Center. The three appellants are Donald Snyder,

former Director of the Department of Corrections; Michael Holmes, the Warden of Big Muddy; and Mark Carich, its Public Service Administrator and the principal designer of the programs to which plaintiffs object. Snyder assigned plaintiffs to Big Muddy, where they mingle with convicts at meals and on some other occasions. Some detainees are housed two to a cell (though never with a convicted inmate). According to plaintiffs, these arrangements violate the Constitution because civil detainees are entitled to housing at facilities separate from convicts, and in the "least restrictive" environment. Plaintiffs' principal problem is the lack of any federal authority for these propositions. They contend, to quote their brief:

> Plaintiffs have not claimed that it is unconstitutional, per se, for them to be confined to a facility that is labeled a "prison" and that also houses criminally convicted inmates. Their claim is a more general one that the Constitution requires them to be placed "in the least restrictive environment consistent with the purposes of the [*Sexually Dangerous Persons Act*]" and that they be provided"housing, recreation, education and treatment in facilities segregated from the general prison population as required by the SDPA."

The argument, in other words, is that the Constitution requires Illinois to fulfill promises that the plaintiffs locate in a state statute. Yet the Constitution does not compel states to follow their own laws. *See DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 202, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989); *Snowden v. Hughes*, 321 U.S. 1, 11, 88 L. Ed. 497, 64 S. Ct. 397 (1944); *Archie v.*

Racine, 847 F.2d 1211, 1215-18 (7th Cir.1988) (en banc). Nor does it permit a federal court to enforce state laws directly. *See Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106, 79 L. Ed. 2d 67, 104 S. Ct. 900 (1984). Plaintiffs need a genuinely federal rule, such as the principle articulated in *Youngberg v. Romeo*, 457 U.S. 307, 321-22, 73 L. Ed. 2d 28, 102 S. Ct. 2452 (1982),that "persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." Although the Court rejected in *Youngberg* an argument that the state must establish the "necessity" of keeping detainees in close custody, it held that they are entitled to "the exercise of professional judgment as to the needs of residents" (*id.* at 322). *Seling v. Young*, 531 U.S. 250, 265, 148 L. Ed. 2d 734, 121 S. Ct. 727 (2001), generalizes the proposition this way: "due process requires that the conditions and duration of confinement . . . bear some reasonable relation to the purpose for which persons are committed."

Thus detainees may be subjected to conditions that advance goals such as preventing escape and assuring the safety of others, even though they may not be punished. *See Allen*, 478 U.S. at 373-74. Does placement in a prison, subject to the institution's usual rules of conduct, signify punishment? The answer, given by *Bell v. Wolfish*, 441 U.S. 520, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979), is no. *Wolfish* held that pretrial detainees, who like civil committees may be held for security reasons but not punished, may be assigned to prisons and covered by the usual institutional rules, which are designed to assure safety and security. Our plaintiffs were not assigned to high-security institutions, solitary, lockdown,

or otherwise onerous confinement. And one must keep in mind that they are pretrial detainees as well as civil committees: criminal charges against them are pending. If pretrial detainees may be subjected to the ordinary conditions of confinement, as *Wolfish* holds, then so may persons detained before trial as sexually dangerous persons.

Plaintiffs do not assert that their situation is worse in any material way than the situation in which ordinary pretrial detainees find themselves. They do not contend, for example, that accused sex offenders suffer injury at the hands of convicted prisoners at Big Muddy more often than at each others' hands, something that if true might be thought to imply that they have been mixed with convicts because of (rather than in spite of) the special risks of violence in prison. Details such as double celling add nothing to plaintiffs' contentions. *Wolfish* rejected an argument that this practice equates to punishment. 441 U.S. at 530-43. College dorms, hospitals, and military barracks house people more than one to a room without amounting to punishment. Just so at Big Muddy. Plaintiffs initial challenge to their confinement therefore fails on the merits, making it unnecessary to consider immunity.

Youngberg, *Allen*, and *Seling* all show that detainees are entitled to some kind of treatment--but plaintiffs don't like the kind on offer. Illinois has concluded that the best treatment for sex offenders is group therapy in which people admit their crimes (to others as well as to themselves), own up to and confront the urges that drive them to perpetrate heinous acts, and then assist each other in overcoming those urges. Illinois administers polygraph examinations to check whether participants in this program are being candid. Its approach is

similar to the one described, and sustained against constitutional challenge, in *McKune v. Lile*, 536 U.S. 24, 153 L. Ed. 2d 47, 122 S. Ct. 2017 (2002). The principal ground of attack in *McKune* was that the state did not supply use immunity for information obtained in its self-accusatory program. The Court replied, in part, that immunity was unnecessary because participation in the program was voluntary; completion of the program entitled the offender to early release. Our plaintiffs say that, because they have not been convicted, they also can't earn early release and that their participation is accordingly involuntary. True enough, the plaintiffs in *McKune* had been convicted while our plaintiffs have not been, but each group enjoys an opportunity to get out earlier. Plaintiffs are free to turn down the treatment Illinois offers. This may make it harder to show that their problems are behind them, that release is in order, and that the criminal charges should be dismissed, but this does not make the choice any less willing or intelligent. An accused who turns down a plea bargain (or declines to assist the prosecutors) may end up with a longer sentence, but this does not vitiate the choice to confess. *See United States v. Klotz*, 943 F.2d 707, 710-11 (7th Cir. 1991).

Illinois contends, as Kansas did in *McKune*, that no participant in the treatment program ever has been criminally prosecuted on account of acts to which the participant admitted during the program. Plaintiffs do not offer any contrary evidence. They do say that, because criminal charges are pending against each of them, they are at greater risk than the Kansas inmates of a change in state practice. Nothing in the formal rules would prevent Illinois from using statements made in the program as confessions in the event a detainee's treatment is deemed unsuccessful, his civil confinement ends,

and the pending criminal charges are reactivated. This possibility is not, however, a ground of recovery. A majority of the Justices concluded in *Chavez v. Martinez*, 155 L. Ed. 2d 984, 123 S. Ct. 1994, No. 01-1444 (U.S. May 27, 2003), that courts may not award damages against investigators who wrongfully induce suspects to supply incriminating information that is never used in a criminal prosecution. Four Justices (Thomas, J., joined by Rehnquist, C.J., and O'Connor & Scalia, JJ.) held this because the self-incrimination clause applies only to evidence used in a criminal case; two Justices (Souter, J., joined by Breyer, J.) held this because any judicially crafted expansion of the clause should be implemented by remedies other than money damages. Although a different majority (Souter, J., joined by Stevens, Kennedy, Ginsburg & Breyer, JJ.) left open the possibility that damages could be awarded under a substantive-due-process theory in the event of genuine physical or mental coercion to speak, our plaintiffs do not contend that their arms were twisted or their health imperiled. So no matter what one makes of the risk that some day Illinois will use against a detainee evidence gathered in its treatment program, no damages remedy is available. Plaintiffs would be free to ask the court to suppress evidence offered against them; they are entitled to no more than that option.

Youngberg holds that, under the due process clause, detainees are entitled to non-punitive programs designed using the exercise of professional judgment. As the Court stated in *McKune*, many specialists think that selfaccusatory features are essential to treatment (just as alcoholics must admit that they have a problem). Plaintiffs disagree with this proposition, and they distrust polygraphs, but neither *Youngberg* nor any other decision holds that judges or juries

may substitute their judgment for that of the professionals who design such programs. This suit is not about whether polygraphs are reliable enough for the results to be used in court; it is about whether wardens and psychologists must pay damages for using them (and other devices) as part of therapeutic programs. The answer is no; it is not clearly established (indeed, it is not the law) that self-accusatory programs and polygraph machines are forbidden when treating sex offenders. As far as the Constitution is concerned, it is enough that judgment be exercised. That the Association for the Treatment of Sexual Abusers (whose position papers may be found at <http://www.atsa.com/pubPPapers.html>) recommends programs different from the one Illinois uses is neither here nor there. The Constitution does not command state officials to follow the majority view of a given professional association. Plaintiffs have not supplied any reason for us to conclude that the choices made by Illinois are so far outside the bounds of professional norms that they must be equated with no professional choice at all. Indeed, plaintiffs have not adduced any expert evidence, period. (At the last minute they tendered a letter by a consultant whose principal writings have had to do with victims' recovered memories. This unsworn document, which showed up after the discovery deadline, has no evidentiary significance.) Nor have they cited any scholarly literature. The defendants' contention that Illinois is using programs that represent the application of reputable professional judgment stands without any serious contest.

As for plaintiffs' contention that treatment must be tailored to each individual rather than administered to groups: one court of appeals has said this (without explanation), see *Ohlinger v. Watson*, 652 F.2d 775, 778-79 (9th Cir. 1980),

but what *Youngberg* held two years later is that (a) committed persons are entitled to some treatment, and (b) what that treatment entails must be decided by mental-health professionals. *Youngberg* deprived the unreasoned assertion in *Ohlinger* of whatever slight value unreasoned judicial assertions otherwise carry. For reasons we have given, it is not possible to say on this record that Illinois' program exceeds the domain of legitimate professional judgment. The three appellants prevail on the merits, without any need for qualified immunity.

REVERSED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

Civil No. 97-432-M JR

[Filed February 25, 2003]

CHARLES PETER ALLISON, et al.,)
Plaintiffs,)
)
v.)
)
JACK HARTWIG, et al.,)
Defendants.)
)

ORDER

REAGAN, District Judge:

Defendants Hartwig, Ball, Carich, Washington, Snyder and Holmes are before the Court seeking summary judgment in the above-captioned civil rights action. (Docs. 190 and 197). Also before the Court is the plaintiffs' "Answering Brief in Reply." (Doc. 200).

According to the Second Amended Complaint (Doc. 117), the 26 remaining named plaintiffs have all been civilly committed to the custody of the Illinois Department of Corrections (IDOC) pursuant to the Sexually Dangerous

Persons Act (SDPA), 725 ILCS 205/0.01 *et seq*. They are all housed at Big Muddy River Correctional Center, an IDOC institution that houses both civilly committed individuals and inmates serving criminal sentences. The plaintiffs have brought suit pursuant to 42 U.S.C. § 1983, alleging that their Fourteenth Amendment rights have been violated by the defendant IDOC directors and prison officials.[1] The plaintiffs generally allege that they are being denied appropriate and adequate treatment by qualified mental health care providers; the right to be housed in the least restrictive accommodations necessary; and the right to be free from actual or threatened physical abuse and other harassment by prisoners and/or staff. Plaintiffs, attacking IDOC and Big Muddy policies and procedures, the pervasive risk of violence[2], as well as specific instances of improper action or inaction, seek injunctive relief, as well as compensatory damages and punitive damages. Accordingly, all six defendants are sued in both their individual and official capacities. The plaintiffs' principal argument is that their constitutional rights can only be adequately protected if they are segregated from those who are serving criminal sentences and housed in a separate

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[1] Plaintiffs actually premised their claims on both the Eighth and Fourteenth Amendments. However, pursuant to *Ingraham v. Wright,* 430 U.S. 651 (1977), this Court dismissed the Eighth Amendment claims because the Eighth Amendment prohibition against cruel and unusual punishment is only applicable to those who have been criminally convicted. *(See* Doc. 170, pp. 2-9).

[2] The Second Amended Complaint refers to "relentless verbal degradation, threats of abuse, battery, assault, and sexual assault, by other [Sexually Dangerous Persons], prison inmates, prison staff and officials." (Doc. 117, p. 6).

facility, where they can be treated for their disorders and not be punished as if they were criminally convicted prisoners.

Defendants present the following arguments for summary judgment, based on their "Statement of Facts Claimed to be Uncontested" and various documentary exhibits (Doc. 197, pp. 2-12 and Defendants Exhibits A-CC):

1. Defendants have not failed to protect the plaintiffs from physical attacks;

2. Plaintiffs fail to allege sufficient personal involvement by defendants Washington, Snyder, Hartwig and Holmes, to the extent it is alleged that they failed to provide adequate and appropriate mental health treatment to plaintiffs;

3. Defendants are entitled to qualified immunity on issues regarding:

    a. Conditions of confinement and whether plaintiffs must be housed in the least restrictive environment;

    b. Requiring plaintiffs to divulge sex-related crimes, submit to polygraphs and waive confidentiality;

    c. The adequacy of treatment offered to plaintiffs; and

    d. Attacks inflicting only *de minimis* injury, and attacks stemming from unknown threats; and

4. Plaintiffs are not entitled to injunctive relief relative to:

    a. Defendants Washington, Hartwig and Ball, who are no longer employed by the IDOC or work at Big Muddy River Correctional Center; and

    b. Plaintiffs James and Wilson, who are no longer part of the Sexually Dangerous Persons program at Big Muddy River Correctional Center.

(Doc. 197).

Standard of Review

Summary judgment is appropriate under Federal Rule of Civil Procedure 56 where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving patty is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *see Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). The purpose of Rule 56 is to enable a party who believes there is no genuine dispute as to a specific fact essential to the other side's case to demand at least one sworn averment of that fact before the lengthy process of litigation continues." *Lujan v. National Wildlife Federation,* 497 U.S. 871,888-889 (1990) (internal citations omitted). Of course, the evidence is construed in the light most favorable to the non-moving party and all justifiable inferences are drawn in favor of that party.

See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

Analysis

A review of the parties' briefs suggests a disagreement regrading the claims raised in the Second Amended Complaint. The nature of defendants' arguments for summary judgment clearly reflect that they construe the Second Amended Complaint as alleging two varieties of constitutional violations: (1) individual torts committed by the defendants in their individual capacities, for which plaintiffs may recover compensatory damages; and (2) overarching policies and customs implemented by the defendants in their official capacities (relating to conditions of confinement and treatment), which may be remedied by injunctive relief. The Court's synopsis of the Second Amended Complaint set forth at the beginning of this order, and the Court's September 4, 2002, order relative to defendants' motion to dismiss (Doc. 170, pp. 1-2), reflect that the Court has consistently shared this view. In contrast, in their response to the subject motion plaintiffs appear to abandon any claims for individual torts by stating:

> Following the Eighth Amendment and pretrial detainee case law that they cite, Defendants labor under the misconception that each Plaintiff must prove that the Defendants knowingly failed to protect them from physical attacks in order to state a claim under this heading. However, Plaintiffs have not alleged claims of battery for the purpose of showing such an Eighth Amendment violation. As pled in the Second Amended Complaint, ([Doc. 117,] ¶¶ 11 and 12), and

> the more definite statements elaborating thereon [Docs. 136-138]. Plaintiffs' point is that they have been placed in a prison and commingled with the general prison population, in a typical prison environment, and subjected to a constant *threat* of battery and assault, as well as constant verbal degradation and harassment. This is part and parcel of an overall punitive regimen that does *not* provide "more considerate treatment and conditions of confinement than *criminals"* [sic] and that is clearly *not* conducive to the object of giving them "a realistic opportunity to be cured or to improve his or her mental condition." *Ohlinger v. Watson,* 652 F.2d 775, 778 99th Cir. 1980). As this Court has already recognized, the allegations of both physical and verbal abuse (which would also encompass threats of harm) cannot be parsed and analyzed separately; they must be viewed in the context of their "cumulative environmental effect." (Mem. Order Sept. 4, 2002, Doc. 170, at 10).

(Doc. 200, p. 3, ¶ 3 (emphasis in original)).

In the interest of clarity, it should be noted that plaintiffs have misconstrued the Court's September 4, 2002, Memorandum and Order. In that order, in relation to defendants' argument that plaintiffs had failed to state a viable constitutional claim regarding being "subjected to relentless verbal degradation" (Doc. 117, p. 6, ¶ 11), the Court stated:

> The Court does not construe the Second Amended Complaint as asserting a discrete claim regarding verbal abuse. Rather, verbal abuse is merely one of

> many conditions of confinement the plaintiffs claim collectively adversely affect their care and safety, and that are effectively punishment. (*See generally* Doc. 117, p. 10, ¶¶ 24(b) and (e)). The Court will not parse the complaint, dismissing any claims relating to the use of abusive language, as defendants would like; to do so would ignore the cumulative environmental effect.

(Doc. 170, p. 10).

The Court was merely emphasizing that each and every allegation in the Second Amended Complaint is not construed by the Court as an individual tort; rather, they collectively constitute the overarching conditions of confinement claim for which plaintiffs seek injunctive relief. In contrast, the Court recognizes that allegations regarding physical attacks on specific plaintiffs by specific defendants, or attacks by inmates or other SDPs which were not prevented by the defendants, may form the basis for both individual tort claims and the overarching conditions of confinement claim for which plaintiffs collectively seek injunctive relief. (*Cf.*, Doc. 170, pp. 13-14 (recognizing that defendants Washington and Hartwig could be liable for both individual acts and policies regarding assaults and harassment)).

In the event the Court is wrong about plaintiffs' apparent abandonment of all individual constitutional torts, Issue 1, regarding whether plaintiffs have failed to state claims that defendants (in their individual capacities) failed to protect plaintiffs from attack will be analyzed.

The Proper Standard for Liability
in re Plaintiffs' Failure to Protect Claims

Defendants generally argue that the evidence in the record does not support a claim against any of the defendants for failing to protect plaintiffs from physical attack. Defendants rely primarily on the landmark Eighth Amendment precedent *Farmer v. Brennan,* 511 U.S. 825, 837 (1994), for the proposition that a prison official's deliberate indifference to a substantial risk of serious harm to health or safety violates an inmate's right to be free of cruel and unusual punishment. As defendants correctly observe, *Estate of Cole by Pardue v. Fromm,* 94 F.3d 254, 258-259 (7th Cir. 1996), holds that the *Farmer* standard is applicable to pretrial detainees because the Fourteenth Amendment due process rights of a pretrial detainee are at least as great as the Eighth Amendment protection available to a convicted prisoner. Accordingly, defendants also rely upon related cases pertaining to pretrial detainees for the various intricacies of their arguments.

Plaintiffs balk at the notion that Eighth Amendment case law is applicable and they insist that *Youngberg v. Romeo,* 457 U.S. 307 (1982), controls. In *Youngberg,* the Supreme Court held that the involuntarily committed have a substantive right under the due process clause of the Fourteenth Amendment to adequate food, shelter, clothing and medical care, which encompasses *reasonable care and safety,* reasonably nonrestrictive conditions of confinement, and such training as may be required to by those interests. *Youngberg,* 457 U.S. at 324. However, *Youngberg* further dictates that "[p]ersons who have been involuntarily committed are entitled to *more considerate* treatment and conditions of confinement

than criminals whose conditions of confinement are designed to punish." 457 U.S. at 321-322 (emphasis added).

Plaintiffs are only partially correct- the Eighth Amendment is generally irrelevant to this case because plaintiffs are not criminally convicted, they are not pretrial detainees, and *Youngberg* does theoretically afford them "reasonable safety" and "more considerate treatment and conditions of confinement." Plaintiffs imply that their failure to protect claims should be analyzed using some sort of reasonableness standard geared toward the purpose for which they are committed. (*See* Doc. 200, pp. 2-3).

Although *Youngberg* did involve physical attacks and safety concerns, those concerns were subordinate to treatment issues in the Supreme Court's analysis and the announced standard for liability. According to *Youngberg,* "liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." 457 U.S. at 323. *Youngberg* was primarily a treatment case and so to apply its standard to a failure to protect issue is inappropriate.

This Court's review ofthe case law reveals that the Court of Appeals for the Seventh Circuit has addressed this paradox on three occasions. Initially, in *Estate of Porter v. Nelson,* 36 F.3d 684 (7th Cir. 1994), the Court of Appeals reasoned that applying the *Farmer* deliberate indifference standard to a civilly committed mental patient housed in a state mental health facility, in a situation involving patient-on-patient violence, would contradict the *Youngberg* edict that the civilly

committed by afforded more considerate treatment and conditions than the criminally convicted. *Estate of Porter,* 36 F.3d at 688. The *Youngberg* "professional judgment" standard was construed as being akin to recklessness and gross negligence, falling somewhere between simple negligence and intentional misconduct. *Id.* In *Estate of Cole v. Fromm*, 94 F.3d 254 (7th Cir. 1996), involving a pretrial detainee held in a state psychiatric ward who committed suicide, the appellate court construed the deceased detainee's suicide as a treatment issue, as opposed to a safety or failure to protect issue, and applied the *Farvner* deliberate indifference standard. However, the appellate court observed that whether the deceased detainee's rights under the Fourteenth Amendment were broader than those afforded a criminally convicted inmate's rights under the Eighth Amendment was not raised in that case. *Estate of Cole,* 94 F.3d at 259 FN 1.

Most recently, in *Collignon v. Milwaukee County,* 163 F.3d 932 (7th Cir. 1999), involving a mentally ill pretrial detainee who committed suicide shortly after his release from custody, the Court of Appeals recognized that the *Youngberg* professional judgment standard was not a workable standard when addressing a variety of decisions made by prison officials, such as when to segregate a prisoner to protect him from the violence of others. *Collignon,* 163 F.3d at 988-989. The Court of Appeals opined that "there is minimal difference in what the *[Farmer/*Eighth Amendment and *Youngberg/*Fourteenth Amendment] standards require of state actors," something more than negligence, approaching intentional wrongdoing. *Collignon,* 163 F.3d at 988. Accordingly, the standard announced in *Estate of Porter* was revised, omitting gross negligence and requiring at least

recklessness, because gross negligence is still negligence and thus falls below the standard needed to impose constitutional liability.[3] *Collignon,* 163 F.3d at 988. The *Youngberg* professional judgment standard only applies to decisions made by medical professionals within their area of expertise; the *Farmer* deliberate indifference standard applies to decisions made by prison officials and decisions made by medical professionals outside their area of expertise. *Collignon,* 163 F.3d at 989. "But significantly, the deliberate indifference standard also applies to the decisions of prison medical personnel as to what medical care a prisoner requires." *Id.*

The situation presented in this case is different from *Estate of Porter, Estate of Cole* and *Collignon*, in that it involves civilly committed individuals housed in a general prison facility. However, in light of *Collignon,* it appears clear that plaintiffs' claims that the defendants failed to protect them must be analyzed using the *Farmer* deliberate indifference standard – which is the standard utilized by defendants.

Issue 1: Physical Attacks

"Section 1983 creates a cause of action based on personal liability and predicated upon fault; thus, liability does not attach unless the individual defendant caused or participated in a constitutional deprivation." *Vance v. Peters,* 97 F.3d 987, 991 (7th Cir. 1996). Relative to plaintiffs' claims that the

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[3] The Court of Appeals indicated the mention of gross negligence in *Estate of Porter was* in the context of its analysis of *Shaw v. Strackhouse*, 920 F.2d 1135 (3rd Cir. 1990), which included gross negligence as falling within the spectrum of constitutionally impenrtissible conduct. *Collignon,* 163 F.3d at 988.

defendants failed to protect them from physical attacks, liability will attach if a defendant "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer v. Brennan,* 511 U.S. 825, 837 (1994). However, in a situation involving *de minimis* injury (or, presumably, the total absence of physical injury) a claim for damages is precluded, although a claim for injunctive relief is possible. *See generally Tesch v. County of Green Lake,* 157 F.3d 465, 476 (7th Cir. 1998).

Defendants argue that, based on their statement of uncontested facts, none of the plaintiffs have stated a viable claim against any of the defendants for failing to protect them from physical attack.[4] Plaintiffs do not take issue with defendants' statement of uncontested facts, or cite to contradictory evidence. (*See* Doc. 202, pp. 2-4). Typically, a concession that there are no questions of material fact would result in the entry of summary judgment, pursuant to Federal Rule of Civil Procedure 56(c) and *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). However, the Court cannot rely upon defendants' statement of uncontested facts or their arguments regarding physical attacks because defendants have minimized at least some of the evidence in the record.

For example, the first two purportedly uncontested facts set forth by defendants are:

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[4] The Court must observe that the aforementioned legal principles would not preclude claims for injunctive relief.

1. The only incident in which Plaintiff Allison alleges he has been physically attacked involved his cellmate, a Sexually Dangerous Person named Charles Bramlett. (Doc. 137, Plaintiffs' Response to Defendants' Request for a More Definite Statement of Paragrpah 11 of the Second Amended Complaint, para. 1.)

2. Plaintiff Allison did not receive any injury that required medical treatment from the attack by Charles Bramlett (Exhibit A, Allison Dep., p. 9.)

(Doc. 197, p. 2). Based on those two "facts," defendants argue "Plaintiff Allison has admitted the only physical attack against him at Big Muddy River Correctional Center did not cause any physical harm." (Doc. 197, p. 13). However, a review ofthe portions of the record reliedupon by defendants reveals that Allison actually alleges in pertinent part: "On or about April 6, 2001, Allison's cellmate Charles Bramlett threatened him and then physically struck Allison while both were confined in their cell. Both were sent to segregation:" (Doc. 138, ¶l(b)). Tile page of Allison's deposition cited by defendants reflects that at some point in time Allison was pushed down, and he banged his head against the bar that comes across the top of his bed, although a pillow was cushioning part of it. (Doc. 137, Defendants' Exhibit A, p. 9). There is no mention of Charles Bramlett, and the preceding pages of the deposition which may reveal the identity of plaintiff's assailant are not provided by defendants.

The Court will not comb the record cross-checking the basis for defendants' 94 "facts." Obviously, questions of material fact preclude entry of summary judgment on Issue 1.

Issue 2: Personal Involvement by Defendants Washington, Snyder, Hartwig and Holmes

Defendants Washington, Snyder, Hartwig and Holmes argue that plaintiffs fail to allege sufficient personal involvement by them with respect to allegations that they failed to provide adequate and appropriate mental health treatment to plaintiffs because they do not have medical training and did not personally participate in the planning, implementation or delivery of plaintiffs' treatment. Plaintiffs counter that defendants' Answer to the Second Amended Complaint concedes that Washington and Snyder, as directors of the IDOC, have had "custody and control" over plaintiffs and been "responsible for their care and treatment." *(See* Doc. 178, ¶¶ 3 and 4). Similarly, plaintiffs note that defendants' Answer concedes that Hartwig and Holmes, as wardens of Big Muddy, have been "responsible for the operation of the institution." (*See* Doc. 178, ¶¶ 3 and 4). Furthermore, Hartwig acknowledges having a role in the hiring of Mark Carich, coordinator of the SDP program at Big Muddy. (*See* Doc. 178, ¶ 8).

At this stage in the proceedings, the Court must look beyond the pleadings in order to assess the merits of each claim, based on the record as it currently stands. *See generally Lewis v. Casey,* 518 U.S. 343,357-358 (1996). The principal reason being that personal involvement is a prerequisite for individual liability in a civil rights action such as this; a defendant must have caused or participated in an alleged constitutional deprivation to incur liability. *Wolf-Lillie v. Sonquist*, 699 F.2d 864, 869 (7th Cir. 1983); 42 U.S.C. § 1983. The doctrine of *respondeat superior* cannot be used to impose Section 1983 liability on a supervisor for the conduct

of a subordinate violating a plaintiff's constitutional rights. *Lanigan v. Village of East Hazel Crest, Ill.*, 110 F.3d 467, 477 (7th Cir. 1997). However; supervisory liability will be found if the supervisor, with knowledge of the subordinate's conduct, approves of the conduct and the basis for it. *Lanigan,* 110 F.3d at 477. Supervisors who are simply negligent in failing to detect and prevent subordinate misconduct are not "personally involved" so as to incur liability. *Id.* "Rather, 'supervisors must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear ofwhat they might see. They must in other words act either knowingly or with deliberate, reckless indifference.'" *Id.* (quoting *Jones v. City of Chicago,* 856 F.2d 985, 992-993 (7th Cir. 1988)); *see also Gossmeyer v. McDonald,* 128 F.3d 481, 495 (7th Cir. 1997).[5]

Plaintiffs' reliance on the defendants' acknowledgment of their supervisory roles is an obvious stretch. The affidavit of Mark Carich, which is not refuted by plaintiffs, clearly shows that Washington, Snyder, Hartwig and Holmes do not possess medical and/or psychological expertise, and they did not participate in the development or implementation of plaintiffs' treatment program. (Doc. 197, Defendants' Exhibit AA). Therefore, their personal involvement would have to be based on the *respondeat superior* doctrine, which is impermissible. Therefore defendants Washington, Snyder, Hartwig and Holmes are entitled to summary judgment relative to plaintiffs' claims against them in their individual capacities

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[5] Defendants would add that prison administrators who have no medical expertise must rely on those with such expertise, citing *McEachern v. Civiletti,* 502 F.Supp. 532, 534 (N.D.Ill. 1980). However, *McEachern* is not controlling precedent.

alleging that they failed to provide plaintiffs with adequate and appropriate mental health treatment.[6]

Qualified Immunity

Qualified immunity generally shields government officials performing discretionary functions from liability for civil damages if their conduct does not violate clearly established statutory or constitutional rights which a reasonable person would have known. *Baxter v. Vigo County School Corp.*, 26 F.3d 728, 737 (7th Cir. 1994). The plaintiffs bear the burden of establishing the existence of a clearly established constitutional right in relation to the specific facts confronting the public official when he acted. *Rakovich v. Wade,* 850 F.2d 1180, 1209 (7th Cir. 1988).

a. The Least Restrictive Environment

Defendants argue that neither the SDPA, nor case law requires plaintiffs to be housed in the least restrictive environment, or prohibits doubie-celling or allowing plaintiffs to come in contact with general population inmates in common areas of the prison. Plaintiffs counter that *Allen v.*

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[6] This holding is consistent with the holding in *Collignon v. Milwaukee County,* 163 F.3d 932, 989 (7th Cir. 1999), that the professional judgment standard enunciated in *Youngberg v. Romeo,* 457 U.S. 307 (1982), only applies to decisions made by medical professionals within their area of expertise, and the deliberate indifference standard enunciated in *Farmer v. Brennan,* 511 U.S. 825, 837 (1994), applies to decisions made by prison officials and decisions made by medical professionals outside their area of expertise.

Illinois, 478 U.S. 364 (1986), sufficiently establishes that housing them alongside criminally convicted inmates not needing psychiatric care- not even in an area set aside from the general prison population- proves that their conditions of confinement are not "more considerate" as required by *Youngberg v. Romeo,* 457 U.S. 307, 321-322 (1982).

In *Allen,* the high court suggested that housing civilly committed SDPs in a pure prison setting, commingled with criminally convicted inmates, could be unconstitutional. *See Allen,* 478 U.S. at 373. However, *Seling v. Young,* 531 U.S. 250 (2001), actually leaves open the possibility that even if the civilly and criminally committed are treated the same, that does not necessarily violate the constitution because civil commitment also serves to protect the community. 531 U.S. at 735-737; *see also Allen,* 478 U.S. at 373 (the fact that sexually dangerous person are housed with criminally convicted inmates who also needed psychiatric care does not mean that scheme is punitive); *Kansas v. Hendricks,* 521 U.S. 346, 363 (1997) (detention of the mentally ill is not necessarily punitive).

These ambiguities in the case law would appear to entitle defendants to qualified immunity insofar as plaintiffs assert that housing them at Big Muddy alongside criminally convicted inmates is a *per se* constitutional violation. However, in ruling on plaintiffs' motion for summary judgment, the Court found that the parties do not even agree that any of the plaintiffs are housed with general population/criminally convicted inmates. (*Compare* Doc. 194, pp. 2-3, ¶ 6 *and* Doc. 199, p. 2, ¶ 3). Consequently, summary judgment is precluded on this mixed question of fact and law. *Guide Intern Corp. v. U.S.,* 948 F.2d 360, 361 (7th

Cir. 1991). Furthermore, defendants ignore the fact that the plaintiffs' case rests primarily on the well established distinction between those serving criminal sentences, and those who are not. *See Youngberg v. Romeo,* 457 U.S. 307 (1982). In accordance with *Youngberg,* a more individualized analysis of each plaintiff's claims is necessary.

b. Preconditions to Treatment

Citing the Supreme Court;s decision in *McKune v. Lile,* ___ U.S. ___, 122 S.Ct. 2017 (June 10, 2002), defendants assert that they are entitled to qualified immunity regarding any claimed constitutional violation related to compelling plaintiffs to divulge sex-related crimes for which they have not been charged, submit to polygraphs and waive confidentiality as prerequisites to, or part of treatment.

McKune v. Lile involved a Kansas criminal sex offender participating in a pre-release treatment program who was required to divulge all prior sexual activities, regardless if those activities constitute uncharged crimes. A polygraph is used to validate the responses, and no privilege or immunity attaches. Failure to participate in the program can result in adverse consequences, ranging from being transferred to a "more strident" facility, to facing additional criminal charges. In a five-to-four decision, the Supreme Court ruled that there was no impermissible "compulsion." The high court focused on the fact that the institutional limits that would be placed on an inmate who declined to participate in the program and make the required admissions did not amount to atypical and significant hardships in relation to the ordinary incidents of prison life, and failure to participate did not extend the term of incarceration or affect eligibility for good-time credits or

parole. The Court viewed the program and the consequences as "choices."

As this Court has opined before, *McKune v. Lile* certainly does not bode well for plaintiffs. However, there may be a key distinction between that case and the case at bar- it is unclear whether plaintiffs' terms of commitment are in effect extended, or if their eligibility for parole or good time is adversely affected if they fail to participate in the program or if they are not found to be wholly truthful and forthcoming in their admissions. The record contains the deposition testimony of defendant Carich, indicating that two individuals, Jeffrey Wilson and Steven Wayne James, were released despite their failure to participate in treatment programs. (Doc. 199, Attachment (Deposition of Carich, pp. 27-28)). Because questions remain regarding the particulars of Wilson's and James' situations, and whether their terms of incarceration, parole eligibility and good time are affected, this issue must proceed.

c. Adequacy of Treatment

A State has considerable discretion in developing care and treatment regimens for those in its custody, provided those regimens are not a substantial departure from acceptable professional judgment. *Youngberg v. Romeo,* 457 U.S. 307, 317 and 323 (1982). In *Kansas v. Hendricks,* 521 U.S. 346, 365-366 (1997), *and Seling v. Young,* 531 U.S. 250, 261-262 (2001), the Supreme Court acknowledged that the fact that not all mental conditions are treatable does not limit the state's power to civilly commit an individual for a potentially indefinite period. Defendants argue plaintiffs present no more than a difference in professional opinion regarding the

appropriate treatment plan, which is insufficient for constitutional liability. *See Youngberg*, 457 U.S. at 321 ("It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made.").

What treatment is professionally available and appropriate obviously must be made on an individualized basis. The Court does not know the particulars of each plaintiffs situation, which alone precludes summary judgment on this issue. Furthermore, the Court has denied plaintiffs' motion for summary judgment regarding the constitutional adequacy of the treatment because the parties present conflicting professional opinions regarding the appropriateness of the treatment program offered. (*Compare* Doc. 198, Exhibit E (opinion of Ralph Underwager, Ph.D.)[7], *and* Doc. 197, Exhibit BB (defendant Carich's responses to interrogatories)).

d. Failure to Protect

Defendants correctly assert that if the Court concludes that defendants can be held liable for failing to protect plaintiffs from attacks inflicting *de minimis* physical injury, or that they can be held liable for failing to protect plaintiffs from threats unknown to defendants, such new statements of the law would entitle them to qualified immunity. However, defendants' argument is premised on their purported uncontested facts, which the Court has found questionable. Therefore, this argument is premature.

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[7] Dr. Underwager's opinion is expressed in a letter, and is not sworn or affirmed in any manner, so pursuant to Fed.R.Civ.P. 56(e) it technically carries no weight.

Issue 4: Injunctive Relief

a. Defendants Washington, Hartwig and Ball

Defendants correctly argue that because defendants Washington, Hartwig and Ball are no longer employed by the IDOC or work at Big Muddy River Correctional Center, injunctive relief cannot be obtained against them. Plaintiffs agree. (Doc. 200, p. 10, ¶ 17). Therefore, summary judgment is appropriate, dismissing all claims for injunctive relief against defendants Washington, Hartwig and Ball.

b. Plaintiffs James and Wilson

Defendants correctly argue that because plaintiffs James and Wilson are no longer part of the Sexually Dangerous Persons program at Big Muddy, injunctive relief is inappropriate with respect to them. Plaintiffs agree. (Doc. 200, p. 10, ¶ 17). Therefore, summary judgment is appropriate, dismissing plaintiffs' James and Wilson's claims for injunctive relief.

IT IS THEREFORE ORDERED that defendants' motion for summary judgment (Doc. 190) is **GRANTED IN PART AND DENIED IN PART**. More specifically, plaintiffs' claims against defendants Washington, Snyder, Hartwig and Holmes, in their individual capacities, alleging that they failed to provide plaintiffs with adequate and appropriate mental health treatment are dismissed due to the defendants' lack of personal involvement. All claims against defendants Washington, Hartwig and Ball for injunctive relief are dismissed in light of the fact that they are no longer employed by the: IDOC and/or at Big Muddy. Because all claims have

been dismissed against defendants Washington and Hartwig in both their individual and official capacities, they are dismissed from this action. All claims asserted by plaintiffs James and Wilson for injunctive relief are dismissed because they have been released and are no longer housed at Big Muddy.

IT IS FURTHER ORDERED that plaintiffs shall file a third amended complaint consistent with this order, and defendants shall file an answer thereafter.

IT IS SO ORDERED.

DATED: February 25th, 2003

/s/ _____
Michael J. Reagan
U.S. District Judge